

Police Prosecutor Update

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A recent court of appeals case decided whether probable cause is required before a law enforcement officer may offer a portable breath test to the operator of a vehicle. The court determined that probable cause is not necessary.

The court looked at Indiana's statutory scheme to decide the issue. The law defines "portable breath test" and "chemical test" separately. IC 9-13-2-22 defines chemical test, and IC 9-30-7-1(1) defines PBTs. Also, the implied consent law, IC 9-30-7-2, states that a person who operates a vehicle impliedly consents to submit to a portable breath test *or* chemical test. If the legislature considered PBTs to be just another form of chemical test, there would have been no reason to list portable breath test as an alternative to chemical test. Also, IC 9-30-7-3(a) suggests that PBTs are screening devices that could eliminate the need to conduct a chemical test. If the PBT is negative, an officer cannot offer a chemical test unless the officer has "probable cause to believe the person is under the influence." And unlike chemical tests, PBTs are not subjected to standards for test operators, equipment, and test administration.

Basically, PBTs are really no different in purpose than field sobriety tests. Thus, because PBTs and chemical tests have different functions, there is no reason to require probable cause for PBTs. However, the court cautioned that this does not mean that officers may offer or administer PBTs whenever a vehicle is stopped for any infraction, even with no indication of alcohol consumption whatsoever. Therefore, the court explicitly held that PBTs may not be administered randomly. An officer must have reasonable suspicion to offer the PBT.

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Another case discussed the trustworthiness of hearsay for the purpose of establishing probable cause. Trustworthiness can be established in a number of ways, including where: (1) the informant has given correct information in the past; (2) independent police investigation corroborates the informant's statements; (3) some basis for the informant's knowledge is demonstrated; or (4) the informant predicts conduct or activity by the suspect that is not ordinarily easily predicted.

This particular case involved declarations against penal interest. Our Supreme Court has cautioned that not all admissions of criminal activity amount to statements against penal interest sufficient to support a finding of probable cause. Statements which admit criminal activity under circumstances in which the crimes otherwise would likely have gone undetected carry their own indicia of reliability, at least sufficient to support a finding of probable cause. The same cannot be said of situations in which the informant is caught red-handed, where the tip is less a statement against penal interest than an attempt to curry favor with the police. Also supporting reliability is the admission to committing a serious offense as opposed to a minor offense. In addition, the court stated that it is compelling when the informant himself initiates contact with the police.

Finally, the court noted that a face-to-face tip tends to establish its reliability for at least two reasons. First, the police officer is able to judge the informant's credibility first-hand. When an informant relates information to the police face-to-face, the officer has an opportunity to assess the informant's credibility and demeanor. Second, a face-to-face tipster has surrendered his anonymity. Individuals who personally report crimes to the police make themselves accountable for lodging false complaints.

Case Names: *State v. Whitney*, ___ N.E.2d ___ (Ind. Ct. App. 2008)
Robinson v. State, 888 N.E.2d 1267 (Ind. Ct. App. 2008)

